

B Ravandran s/o Balan v Maliga d/o Mani Pillai

HIGH COURT (JOHORE BAHRU) — DIVORCE APPLICATION NO 33-191-1994

HAIDAR MOHD NOOR J

18 OCTOBER 1995

Family Law — *Children — Custodianship — Application for custodianship by father — Factors to be considered — Whether welfare of children paramount — Whether child below seven years of age should be placed in custody of mother — Law Reform (Marriage and Divorce) Act 1976 ss 88(2) & (3)*

Family Law — *Children — Guardianship — Children ranging in ages of nine months and nine years plus — Whether father should be the guardian in normal circumstances — Guardianship of Infants Act 1961 ss 5 & 10*

Family Law — *Maintenance — Maintenance of wife and children — General principles — Law Reform (Marriage and Divorce) Act 1976 ss 77, 78 & 93*

Family Law — *Matrimonial property — Division of property — Matrimonial home purchased by and registered in husband's and wife's names — Wife's contributions to initial payment — Factors to be considered — General principles — Law Reform (Marriage and Divorce) Act 1976 s 76(2)*

The petitioner and the respondent were lawfully married at the Marriage Registry, Johor Bahru on 22 February 1984 and they had four children, ranging in ages of nine months and nine years plus, living with the respondent. Subsequently, their marriage broke down. In his petition for divorce, the petitioner prayed for, inter alia, dissolution of the marriage and custodianship of their children. At the hearing, the marriage was dissolved by consent. However, the respondent contested the custodianship issue, and in turn, sought maintenance for herself and the children, the petitioner's half share in the matrimonial home and the costs of the petition. The two elder children aged eight and nine were interviewed separately by the judge in chambers to consider their wishes. The petitioner, being a busy businessman, contended that his unmarried niece and mother could take care of the children if he were given custody. The respondent sought a sum of RM2,500 as maintenance for herself and the children and the petitioner offered RM1,350. The matrimonial home was registered in the joint names of both the petitioner and the respondent and it was not disputed that the respondent contributed towards the initial purchase price. The respondent, during the period she worked, surrendered her whole pay packet to the petitioner.

Held, allowing the petition in part:

- (1) The respondent was given custody of all the four children with reasonable access to the petitioner. As regard the two younger children, the petitioner had failed to rebut the presumption that

- A it is for the good of a child below the age of seven years to be with his or her mother under s 88(3) of the Law Reform (Marriage and Divorce) Act 1967 ('the Act'). As for the two elder children, the court had given their welfare paramount consideration, and had taken into account their wishes and their parents' wishes pursuant to s 88(2) of the Act. The love and care of the unmarried niece or of the grandmother would not be the same as that of the natural mother. It would also be inappropriate to disturb the togetherness of the four children because of the matrimonial problems of their parents (see pp 155H-I, 156 and 157A-C).
- B
- C (2) Ordinarily, the father of an infant shall be the guardian of the infant's person and property until the infant has attained the age of majority under s 5 of the Guardianship of Infants Act 1961. As there were no grounds why the father should not be the guardian of all the infants, the petitioner remained the guardian until they reached the age of majority (see p 157E-F).
- D (3) Having regard to the means and needs of the parties and the income of the petitioner, and the finding that each party was equally responsible for the breakdown of the marriage, the petitioner was ordered to pay maintenance to the respondent and the four children a sum of RM1,500 per month from the date of the order (see p 158G).
- E
- F (4) As both the parties had contributed to the purchase of the matrimonial home, it would not be appropriate to transfer the whole of the matrimonial home to the respondent for there would be nothing to stop her from selling it. The proper order was that the status quo remained and the matrimonial home could be sold when the children attained majority and the proceeds to be divided equally between the parties (see p 159E-F).

[Bahasa Malaysia summary]

- G Pempetisyen dan penentang telah berkahwin secara sah di Pejabat Pendaftaran Perkahwinan, Johor Bahru pada 22 Februari 1984 dan mereka mempunyai empat orang anak, berumur antara sembilan bulan dan sembilan tahun lebih, yang tinggal bersama penentang. Kemudiannya, perkahwinan mereka retak. Dalam petisiyennya untuk perceraian, pempetisyen memohon untuk, antara lain, pembubaran perkahwinan dan jagaan anak-anak mereka. Semasa pembicaraan,
- H perkahwinan tersebut telah dibubarkan secara persetujuan. Walau bagaimanapun, penentang mencabar isu penjagaan, dan sebagai balasan, meminta penyenggaraan bagi dirinya dan anak-anaknya, setengah bahagian pempetisyen dalam kediaman suami isteri dan kos petisyen. Dua orang anak yang lebih tua telah ditemu duga secara
- I berasingan oleh hakim dalam kamar bagi mempertimbangkan kehendak mereka. Pempetisyen, seorang ahli perniagaan yang sibuk, berhujah bahawa anak saudara perempuan yang tidak berkahwin dan ibunya boleh menjaga anak-anak jikalau dia diberi jagaan. Penentang

telah meminta jumlah sebanyak RM2,500 sebagai penyenggaraan bagi dirinya dan anak-anak dan pempetisyen telah menawar RM1,350. Kediaman suami isteri didaftarkan atas nama bersama kedua-dua pempetisyen dan penentang dan adalah tidak dipertikaikan bahawa penentang telah menyumbang kepada harga belian awal. Penentang, semasa tempoh bekerja, telah menyerahkan seluruh gajinya kepada pempetisyen.

Diputuskan, membenarkan sebahagian petisyen itu:

- (1) Penentang telah diberi jagaan kesemua empat orang anak dengan akses munasabah kepada pempetisyen. Berkenaan dengan dua orang anak yang lebih kecil, pempetisyen telah gagal mematahkan anggapan bahawa adalah untuk kebaikan seorang budak yang berumur kurang daripada tujuh tahun untuk bersama ibunya di bawah s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'). Bagi dua orang anak yang lebih tua pula, mahkamah telah memberikan kebajikan mereka pertimbangan yang paling utama, dan telah mengambil kira kehendak ibu bapa dan anak-anak mereka mengikut s 88(2) Akta tersebut. Kasih sayang dan jagaan anak saudara perempuan yang tidak berkahwin atau pun nenek tidak sama dengan kasih sayang dan jagaan ibu sebenar. Juga, adalah tidak sesuai untuk mengganggu penyatuan empat orang anak tersebut akibat masalah-masalah perkahwinan ibu bapa mereka (lihat ms 155H-I, 156 dan 157A-C).
- (2) Biasanya, bapa seorang budak harus menjadi penjaga budak itu and hartanya sehingga budak itu mencapai umur majoriti di bawah s 5 Akta Jagaan Budak 1961 [Guardianship of Infants Act 1961]. Oleh kerana tiadanya alasan mengapa si bapa tidak patut menjadi penjaga kesemua budak, pempetisyen kekal sebagai penjaga sehingga mereka mencapai umur majoriti (lihat ms 157E-F).
- (3) Memandangkan kemampuan dan keperluan pihak-pihak dan pendapatan pempetisyen serta pendapat bahawa setiap pihak sama-sama bertanggungjawab atas keretakan perkahwinan, pempetisyen diperintahkan membayar penyenggaraan kepada penentang dan empat orang anak sejumlah sebanyak RM1,500 sebulan dari tarikh perintah (lihat ms 158G).
- (4) Oleh kerana kedua-dua pihak telah menyumbang kepada belian kediaman suami isteri, ianya tidak sesuai untuk memindahkan seluruh kediaman suami isteri kepada penentang sebab tiada apa-apa yang akan menghalangnya daripada menjual harta itu. Perintah betul adalah bahawa status quo kekal dan kediaman suami isteri bolehlah dijual apabila anak-anak mencapai majoriti dan hasil untuk dibahagikan sama rata di antara pihak-pihak (lihat ms 159E-F).]

A Notes

For cases on custodianship, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766–1831.

For cases on guardianship, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1833–1840.

B For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1844–1846.

For cases on matrimonial property, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2129–2172.

C Cases referred to

Chamberlain v Chamberlain [1974] 1 All ER 33

Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189

Legislation referred to

Guardianship of Infants Act 1961 ss 5, 10

D Law Reform (Marriage and Divorce) Act 1967 ss 76(2), 77, 78, 88(2), (3), 93, 106

George Mathews (Gana Muthusamy & Co) for the petitioner.

Navamani (Navamani Arumugam) for the respondent.

E

Cur Adv Vult

Haidar Mohd Noor J: In this divorce petition, as amended ('encl 34'), the petitioner, B Ravandran s/o Balan prays that:

- F** (a) the marriage be dissolved;
- (b) custody of the children — Menaga d/o B Ravandran, Rajiv s/o B Ravandran, Shanti d/o B Ravandran and Logkes d/o B Ravandran — be granted to the petitioner;
- (c) the costs of the proceedings be borne and paid by the respondent;
- G** and
- (d) for such further or other relief that this Honourable court deems fit and just.

H The petitioner and the respondent were lawfully married on 22 February 1984 and their marriage was registered at the Pejabat Pendaftaran Perkahwinan, Johor Bahru (see exh RB1). They had, since March 1988, cohabited at No 0480, Block 8, 04–80, Taman Cempaka, SEDC, Tampoi, Johor ('the matrimonial home').

There are four children arising out of the said marriage. They are:

- I** (a) Menaga d/o B Ravandran (f)
— 9 years 4 months
- (b) Rajiv s/o B Ravandran (m)
— 8 years 5 months

- (c) Shanti d/o B Ravandran (f)
— 1 year 11 months
- (d) Logkes d/o B Ravandran (f)
— 9 months

(See exh RB2a-d).

They are all presently living with the respondent.

Subsequently, the petitioner and the respondent had matrimonial difficulty and it was referred, on 1 November 1993, to the conciliatory body under s 106 of the Law Reform (Marriage and Divorce) Act 1967 ('the Act') and a certificate of non-reconciliation of the marriage was issued (exh RB4). The said marriage had broken down irretrievably. Hence, the present petition.

In the meantime, sometime on 10 March 1994, the respondent filed Originating Summons No 24-517 of 1993 for the custody, guardianship and maintenance of the children etc. The parties, by consent, agreed to the following orders (exh RB3):

- (1) custody of the four children be given to the respondent until they attain the age of majority;
- (2) guardianship of the four children remains with the petitioner;
- (3) the petitioner is given free access to visit the four children;
- (4) the petitioner to pay RM1,000 per month as maintenance to the respondent and the four children, such payment to be made before the tenth of each month, commencing from the month of March 1994 with liberty to apply and the respondent to keep an account of the monthly expenses and the petitioner is given the right to check at the end of each month;
- (5) the respondent and the children be given the right to stay in the matrimonial home peacefully without any interference from the petitioner and the respondent is barred from permitting a third party from staying in the matrimonial home, except with the permission to be obtained from the petitioner first;
- (6) the respondent and the petitioner are barred from attacking, harassing, threatening and insulting each other in any way whatsoever; and
- (7) the petitioner to pay costs of RM2,000 to the respondent through her solicitors, Tetuan John Ang & Jega.

It appears that the petitioner, way back in 1991, contemplated divorce proceedings. However, on the advice of his solicitors, the petitioner attempted to reconcile for the sake of, and in the interests and welfare of, the children. Apparently, this failed and the petitioner filed this petition for divorce.

- A In view of the alleged misconduct of the respondent, the petitioner applied for amendment of the consent order to have the custody of the four children. As a result, by consent, prayers 12(b) and (c) of the petition were amended for the custody of the children to be given to the petitioner (see encl 34). It was agreed by the parties that the order of the court dated 10 March 1994 was an interim order only.
- B

- The respondent, in her answers to the amended petition, denied the allegation of her misconduct by the petitioner. She counter-alleged the misconduct of the petitioner. She further alleged that, though divorce action was contemplated in 1991, the petitioner did not proceed with divorce proceedings then. They continued to live together and the respondent claimed that, if at all there were matrimonial offences, they had been condoned by the petitioner. In fact, the allegations and counter-allegations remained mere allegations only.
- C

- When the petition came for hearing, the parties consented to have their marriage dissolved, and I made an order accordingly. However, the respondent contested the custody issue and also prayed for the petitioner to pay a monthly sum of RM2,500 as maintenance for herself and her four children until the youngest child reaches the age of majority and that the matrimonial home be transferred to her as registered proprietor free of all encumbrances and also the petitioner be condemned in costs (see encl 31).
- D
- E

As a result, oral evidence was led by both parties in respect of these other issues.

Custody

- F In respect of custody of a child, the relevant law is s 88(2) of the Act, which provides:

88(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —

- G
- (a) to the wishes of the parents of the child; and
 - (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

- Section 88(2) would be relevant to consider in respect of the first two children, namely, Menaga d/o B Ravandran (f), aged 9 years and 4 months and Rajiv s/o B Ravandran (m), aged 8 years and 5 months. However, in respect of the other two children — Shanti d/o B Ravandran (f), aged 1 year and 11 months and Logkes d/o B Ravandran (f), aged 9 months — according to s 88(3):
- H

- I There shall be a rebuttable presumption that it is for the good of a child *below the age of seven years* to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

From my observation of the evidence before me, it would appear that the petitioner is not pressing for the custody of the two younger children, presumably because of their ages and the fact that they had been staying with the respondent. In the event, I am satisfied that the presumption had not been rebutted and I therefore order that the respondent be given the custody of the two younger children.

In respect of the two elder children, the wishes of the parents are clear-cut; each wants custody of the children.

In that event, in considering the issue of custody of the two elder children, it would appear that the paramount consideration should be the welfare of the children. However, the 'paramount consideration' factor does not mean that it should be first on the list of factors to be considered, but rather that it must be the overriding consideration. The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare (see *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189 at p 193).

According to s 88(2) of the Act, the court, besides considering the welfare of a child, should have regard to the wishes of the parents and the wishes of the child where he or she is of an age to express an independent opinion. In considering the wishes of the two elder children, it behoves upon me then to interview each of them in my chambers in the absence of their parents and counsels. I then took action to interview each of them separately in my chambers with the assistance of my Indian interpreter.

The first child, Menaga d/o B Ravandran, told me in no uncertain terms that she would prefer to stay with her mother, the respondent. According to her, the petitioner was always working and had no time for her. From my observation of her, I formed the opinion that though she was only about nine years old, she could express an independent opinion as to her preference.

On the other hand, the second child, Rajiv s/o B Ravandran, told me that he would prefer to be with the petitioner. He alleged that his mother, the respondent, did not look after him. According to him, his father told him that he (the father) would engage somebody to look after him. Rajiv is eight years old. My own observation of Rajiv is that he is quite incapable of expressing an independent opinion or to appreciate the consequences of his opinion. I am of the opinion that he is rather influenced by material gains in expressing his preference to be with his father, the petitioner. Further, in all probability, he was influenced by the petitioner.

The petitioner contended that if he were given custody of the children, he would get his mother to look after them. In addition thereto, he would get his niece, who is not married, to take care of them. The petitioner himself being a busy businessman, in my view, could not effectively spend much time to look after the children. Neither could his unmarried niece look after them indefinitely. She would one day get married and have a family of her own. Because of her age, I doubt whether the petitioner's mother could really take care of the children. In any event, she did not say that she was prepared to take care of them either. On the other hand, the

- A respondent is not working and could spend more time to look after the needs of the children and to shower her love and care on them. I do not think the love and care of the unmarried niece or, for that matter, of the grandmother, would be the same as that of the natural mother. The four children have been living with the respondent all these years and I do not think it is appropriate that their togetherness should be disturbed because of the matrimonial problems of their parents. They are still very young. However, I am not suggesting that the petitioner has no love for his children. He has the financial means to make them happy, but that is not the criteria for my consideration on the custody issue.

- C In the circumstances, I order that the respondent be given custody of all the four children with reasonable access to the petitioner.

- D As regards reasonable access, I order that the petitioner be given the liberty to visit the children daily during daytime and that he is entitled to take the children every Saturday to spend the weekend with him and to return the children on the following Sunday.

Guardianship

- E Ordinarily, the father of an infant shall be the guardian of the infant's person and property until the infant has attained the age of majority (see s 5 of the Guardianship of Infants Act 1961). However, by virtue of s 10 of the Guardianship of Infants Act 1961, the court or a judge may at any time remove the guardianship of the father and appoint any person to be guardian in his place.

- F I see no grounds why the father should not be the guardian of all the infants under s 5 thereof and I therefore make an order that the petitioner be the guardian of all four children until they reach the age of majority.

Maintenance for the respondent and children

- G In view of my order in respect of the custody of the children, I would then have to consider what is the appropriate maintenance to be given to the respondent and her children.

The power of the court to order maintenance of spouse is provided under s 77, and that of a child under s 93 of the Act.

The assessment of maintenance is provided by s 78 of the Act, which reads:

- H In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

I The law is clear that the petitioner has to pay maintenance to the respondent and her children. The question is: how much?

The respondent, in her answer to the petition and in her evidence in court, asked for maintenance of RM2,500 per month comprising: A

- (i) RM400 per month for the two younger children;
 - (ii) RM500 per month for the other two children;
 - (iii) RM800 per month for household expenses;
 - (iv) RM100 per month for utilities bills; and
 - (v) RM300 per month for herself.
- B

The sums of RM400 and RM500 per month for the four children, in my view, would be slightly on the high side and further, the claim under item (iii) would, to a certain extent, overlap with the claims under items (i) and (ii). I would therefore propose to consider items (i), (ii) and (iii) together. The claim for item (iv) is quite reasonable and for item (v), the respondent maintained the same sum in her oral evidence. The petitioner is not seriously disputing the claims under items (iv) and (v). C

In respect of the consent order dated 10 March 1993, it was agreed by the respondent that the monthly maintenance be at RM1,000 per month. Counsel for the petitioner contended that the respondent did not complain that the said sum was inadequate. However, the petitioner himself admitted that he would pay for the school expenses and pocket money for the two elder children and also toys and clothing for the children and he used to pick up the medical bills also. As these extra expenses were met by the petitioner personally, there is a possibility therefore that the sum of RM1,000 per month would be adequate then. The petitioner admitted that his nett income per month is RM5,000 without taking into account RM1,000 he paid to the respondent as per the consent order. In addition, he is paying the monthly instalment of the matrimonial home which is RM202.52. As a businessman, I agree with the petitioner that his monthly income varies. He is not a salaried man. However, the petitioner was prepared to pay an additional sum of RM350 per month. D E F

Having regard to the means and needs of the parties and the income of the petitioner — and I would say that each party is equally responsible for the breakdown — I order the petitioner to pay maintenance to the respondent and the four children a sum of RM1,500 per month from the date of this order. G

Matrimonial home

H

Presently, the matrimonial home is jointly registered under the names of both the petitioner and the respondent.

Section 76(2) of the Act stipulates the considerations for the court to order division of matrimonial assets. Section 76(2) reads:

- 2 In exercising the power conferred by subsection (1) the court shall have regard to — I

- A (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (b) any debts owing by either party which were contracted for their joint benefit;
- (c) the needs of the minor children, if any, of the marriage,
- B and subject to those considerations, *the court shall incline towards equality of division.* (Emphasis is mine)

It is not disputed that the respondent contributed towards the initial payment of the matrimonial home. In fact, according to her, she had to take a loan from her mother and the petitioner agreed, but contended that he had settled the loan, though denied by the respondent. In addition, the respondent, during the period she worked, surrendered her whole pay packet to the petitioner and this evidence was not denied by the petitioner, though he asserted that the money was used towards the household expenses. I cannot accept this aspect of the petitioner's evidence as household expenses should be his responsibility.

- D No doubt the petitioner contributed substantially towards the purchase of the matrimonial home and even now continues to pay the monthly instalment but taking into consideration the contribution of the respondent and the needs of the children, I am inclined to the view that it would not be appropriate to transfer the whole of the matrimonial home to the respondent as prayed by her. Further, there could be a probability that if it is registered solely under her name, there would be nothing to stop her from selling it.
- E

- In the circumstances, the proper order would be to let the status quo remain and in the event the children attained the age of majority, the matrimonial home could be sold and the proceeds be divided equally between the parties (see *Chamberlain v Chamberlain* [1974] 1 All ER 33).
- F

Costs

- It is not disputed that the respondent's counsel was assigned to her by the Bar Council's Legal Aid Bureau because the respondent had no means to pay. The petitioner is financially strong and the allegations were unsubstantiated. In the circumstances, I am of the view that the costs of the proceedings should be borne by the petitioner, and I do so order.
- G

- The parties are at liberty to apply in the event of change of circumstances.
- H

Order accordingly.

Reported by Ringo KL Low